IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. .....

MOUNTAIN STATES FEDERATION OF TELEPHONE WORKERS, LOCAL 402 P. ET AL., PETITIONERS,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT.

RESPONDENT'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI.

Comes now The Mountain States Telephone and Telegraph Company, a corporation, Respondent herein, and in reply to the petition for a Writ of Certiorari filed in this Honorable Court by Petitioners herein, respectfully states that the petition for a Writ of Certiorari should not be granted for the following reasons:

1. The controversy which existed between the parties at the time of the filing of this suit in the Thirty-fourth District Court of El Paso County, Texas, has long since been

settled, and this is a moot case. An order of dismissal was entered by the Thirty-fourth District Court on May 20, 1947 (Tr. 33), and Petitioners' appeal to the Court of Civil Appeals was dismissed on June 19, 1947 (Tr. 33) on Respondent's motion to dismiss on the ground that the case was moot. (Petitioners' petition correctly so states, page 2.) Moot cases will not be reviewed by the Supreme Court of the United States. *Commercial Cable Co. vs. Burleson,* 250 U. S. 360, 63 L. Ed. 1030; *Shaffer vs. Howard,* 249 U. S. 200, 63 L. Ed. 559; *Standard Oil Co. vs. United States,* 283 U. S. 163, at 181, 182, 75 L. Ed. 926; *Natural Milk Producers Assn. vs. San Francisco,* 317 U. S. 423, 87 L. Ed. 375.

2. The dismissal of Petitioners' appeal in the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, was entered upon motion to dismiss because the case was moot (correctly so stated in Petition, page 2). This is a non-federal ground, and for that reason this petition should be denied.

McCoy vs. Shaw, 277 U. S. 302, 72 L. Ed. 891,
Penn R. Co. vs. Illinois Brick Co., 297 U. S. 447, at 462, 80 L. Ed. 796.

3. Petitioners, who were defendants in the Trial Court, filed an answer and cross-action in that Court (Tr. 23). They not only answered in the case, thereby waiving any claim of right to remove said cause, but they also filed a cross-action therein, asking for affirmative relief, and thereby made certain the fact that they themselves invoked the jurisdiction of the Thirty-fourth District Court of El Paso County, Texas, and waived any claim of right to remove said cause to the United States District Court.

4. Petitioners could have filed a removal transcript in the United States District Court at El Paso, Texas, within thirty days from the filing of the Petition and bond for removal, but this they did not do, nor did they make any effort whatsoever to make effective the jurisdiction which they assert was in the Federal Court. If this had been a removable cause, Petitioners had a plain, direct, speedy remedy, namely, to petition the United States District Court, Western District of Texas, El Paso Division, for an injunction, enjoining Respondent from further prosecuting its suit in the State Court. *Dillinger vs. C. B. & Q. R. R. Co.,* 19 Fed. 2d 196.

5. Petitioners attempted to show by matters set up in their petition to remove that this was a removable case, but whether it was removable or not is determined solely by the allegations in Respondent's Original Petition (Bill of Complaint), and those allegations do not set up a removable cause. It is there alleged only that defendants (Petitioners here), who were residents of Texas, were violating the laws of Texas (Tr. 1-9). Plaintiffs' original petition contained no allegations which expressly, impliedly, or necessarily involved any Federal Statutes, and the only source of the contention that any Federal Statutes are involved are the allegations to that effect in the Petition for Removal. A case is not removable unless it appears from the face of plaintiff's pleading that the case arises under the laws of the United States. *Gully vs. First National Bank,* 299 U. S. 109, 81 L. Ed. 70. In the case cited it is said, in an opinion written by Mr. Justice Cardozo:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin v. New York,* 115 U. S. 248, 257; *First National Bank v. Williams,* 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County v. Seattle School District,* 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto *(New Orleans v. Benjamin,* 153 U. S. 411, 424; *Defiance Water Co. v. Defiance,* 191 U. S. 184, 191; *Joy v. St. Louis,* 201 U. S. 332; *Denver v. New York Trust Co.,* 229 U. S. 123, 133), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee v. Union & Planters Bank,* 152 U. S. 454; *Louisville & Nashville R. Co. v. Mottley,* 211 U. S. 149; *The Fair v. Kohler Die & Specialty Co.,*

228 U. S. 22, 25; *Taylor v. Anderson*, 234 U. S. 74. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine v. Los Angeles*, 202 U. S. 313, 334; *The Fair v. Kohler Die & Specialty Co.*, supra."

For each of the reasons above set out, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

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DENIED